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No.

In the Supreme Court of the United States

October Term, 1984

RICHARD A. SNIDER
and
MARGARET Q. SNIDER
Appellants,

vs.

COMMONWEALTH OF VIRGINIA
Appellee.

On Appeal From the Supreme Court
Of the Commonwealth of Virginia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does the Virginia Compulsory Attendance Law violate the First and Fourteenth Amendments to the United States Constitution by impermissably attempting to constrict by definition citizens' rights under the First Amendment?

2. Does the Virginia Compulsory Attendance Law violate the Equal Protection Clause of the Fourteenth Amendment by regulating the requirements for being taught by a teacher or tutor outside of school, while not regulating private, denominational or parochial school?

3. Does the Virginia Compulsory Attendance Law violate the free exercise of religion by parents and children, and the parental liberty toward children as guaranteed by the Free Exercise Clause of the First Amendment and the Virginia Constitution?

4. Does the Virginia Compulsory Attendance Law usurp the conscientious exercise of responsible parental authority and disrupt the family unit by enforcing state ordained and mandated educational parameters?

PARTIES BELOW AND CORPORATE PARTIES' AFFILIATIONS

Richard A. Snider and Margaret Q. Snider are individuals and they have no corporate affiliations.

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October Term, 1984

RICHARD A. SNIDER

and

MARGARET Q. SNIDER

Appellants,

VS.

COMMONWEALTH OF VIRGINIA

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF VIRGINIA

JURISDICTIONAL STATEMENT

Appellants, Richard A. Snider and Margaret Q. Snider (defendants below), appeal from the judgment and opinion of the Supreme Court of Virginia entered on January 18, 1985, which affirmed that Virginia Code §§ 22.1-254, 22.1-256 and 22.1-257 were not violative of the United States Constitution and which affirmed

the finding that Appellants had violated that Virginia Code § 22.1-254.

OPINIONS BELOW

The order of the Supreme Court of Virginia denying Appellants' Petition for Rehearing is not reported but appears as Appendix A, infra. The order of the Supreme Court of Virginia denying Appellants' Petition for Appeal is not reported but appears as Appendix B, infra. The orders of the Circuit Court of Henrico County, Virginia, sentencing the Appellants for violating Virginia Code § 22.1-254 are not reported but appear as Appendices C & D, infra.

JURISDICTION

This is an appeal from a final judgment entered by the Circuit Court of Henrico, Virginia, from which Appellants'

Petition for Appeal and Petition for Rehearing to the Virginia Supreme Court were denied, holding that the Virginia Compulsory Attendance Statute, Virginia Code § 22.1-254 et seq., was valid and did not violate either the United States Constitution or the Constitution of the Commonwealth of Virginia. In their pleadings and oral arguments throughout the proceedings in the state courts, appellants (defendants below) drew into question the validity of the Virginia Compulsory Attendance Statutes, Virginia Code § 22.1-254 et. seq. as being repugnant to the Constitution of the United States. Judgment was imposed after the Supreme Court of Virginia denied Appellants' Petition of Appeal (orders of Circuit Court of Henrico County, Virginia, entered November 30, 1984, appear as Appendices E & F,

infra.). An Amended Notice of Appeal to this Court was filed with the Clerk of the Supreme Court of Virginia on April 16, 1985 (Appendix G). This Court has jurisdiction of this appeal by virtue of 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;..."

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States provides:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law;..."

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States provides:

"No state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws."

The pertinent parts of **the Constitution of the Commonwealth of Virginia** provide:

> **Article I, § 16.**
> **Free exercise of religion; no establishment of religion.** That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities...
>
> **Article I, § 17.**
> **Construction of the Bill of Rights.** The rights enumerated in this Bill of Rights shall not be constructed to limit other rights of the people not therein expressed.

Article VIII, § 3.
Compulsory education; free textbooks. The General Assembly shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age, such eligibility and age to be determined by law. It shall ensure that textbooks are provided at no cost to each child attending public school whose parent or guardian is financially unable to furnish them.

The pertinent parts of the sections of **the Virginia Code on Compulsory School Attendance** involved are as follows:

§ 22.1-254.
Ages of children required to attend. Every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before October thirty-first of the 1980-1981 school year and September thirtieth of any school year thereafter and who has not passed the seventeenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent.

§ 22.1-256. Children exempted from article. A. The provisions of this article shall not apply to:

1. Children suffering from contagious or infectious diseases while suffering from such diseases;

1a Children whose immunizations against communicable diseases have not been completed as provided in § 22.1-271;

2. Children under ten years of age who live more than two miles from a public school unless public transportation is provided within one mile of the place where such children live;

3. Children between ten and seventeen years of age who live more than two and one-half miles from a public school unless public transportation is provided within one and one-half miles of the place where such children live;

4. Children excused under § 22.1-257 of this article;

5. Any child who will not have reached his sixth birthday on or before December thirty-one of each school year whose parent or guardian notifies the appropriate school board that he does not wish the child to attend school until the following year;

6. Any child withdrawn from kindergarten as provided in § 22.1-3 until the school year following the withdrawal.

B. The distances specified in paragraphs A 2 and A 3 of this section shall be measured or determined from the entrance to the school grounds or the school bus stop nearest the entrance to the school grounds or the

school bus stop nearest the entrance to the residence of such children by the nearest practical routes which are usable for walking or riding. Disease shall be established by the certificate of a reputable practicing physician in accordance with regulations adopted by the Board of Education.

§ 22.1-257. Excusing children who cannot benefit from education or whose parents conscientiously object; excusing children for reasons of health or apprehension for personal safety.

A. A school board:

1. May, on recommendation of the principal and the division superintendent, with the written consent of the parent or guardian, excuse from attendance at school any pupil who the school board determines, in accordance with regulations of the Board of Education, cannot benefit from education at such school;

2. Shall excuse from attendance at school any pupil who, together with his parents, by reason of a bona fide religious training or belief, is conscientiously opposed to attendance at school;

3. Shall, on the recommendation of the juvenile and domestic relations district court of the county or city in which the pupil resides, excuse from attendance at school for such period of time as the court deems appropriate any pupil who, together with his parents, is opposed to attendance at a school by reason of concern for such pupil's health, as verified by competent medical

evidence, or by reason of such pupil's reasonable apprehension for personal safety when such concern or apprehension in that pupil's specific case is determined by the court to be justified;

4. May, on recommendation of the juvenile and domestic relations district court of the county or city in which the pupil resides, excuse from attendance at school any pupil who, in the judgment of such court, cannot benefit from education at such school.

B. The court in reaching its determination as to whether the concern or apprehension referred to in paragraph A 3 of this section is justified shall take into consideration the recommendation of the principal and division superintendent.

C. As used in paragraph A 2 of this section, the term "bona fide religious training or belief" does not include essentially political, sociological or philosophical views or a merely personal moral code.

§ 22.1-263. Violation constitutes misdemeanor. Any person violating the provisions of § 22.1-254 or § 22.1-255 shall be guilty of a Class 4 misdemeanor.

STATEMENT

Richard A. Snider and Margaret Q. Snider are traditional Catholics, being members of the Pius X movement which is a movement within the Catholic church which adheres to traditional Catholic doctrine. The traditional Catholics trace their faith which they maintain has remained fundamentally unchanged back to 33 A.D. What has changed is the society in which they live. Consequently, it is of paramount importance to preserve the traditional Catholic faith. And that is what the Sniders are doing in assuring a traditional Catholic education for their children.

The education of their children is not something that the Sniders take lightly. Mrs. Snider was raised a traditional Catholic and taught that within the Catholic faith there are

absolutes, absolute right and absolute wrong and the absolutes found in the Bible and in the canons of the church. However, as this began to change, Mrs. Snider became disillusioned with the new Catholicism that sprang forth as a result of Vatican II which began in 1962 and concluded in 1965.

As a result of their religious convictions, the sincerity of which is not questioned by the Commonwealth, the Sniders are conscientiously opposed to sending their children to the public schools which would expose them to the religion of secular humanism which would be an attack on their traditional Catholic faith; they are opposed to sending their children to Catholic schools because of the secular influence that has permeated the Catholic schools since Vatican II; and in fact even the

private schools to which they have sent their children for two years exhibit a secular humanist taint which was a danger to the Sniders' faith and would be exposing the Snider children to an "occasion of sin."

In September of 1982, the Sniders began teaching their children at home through the Our Lady of Victory home study course. In early October, the Sniders received a phone call from the principal of the local public school asking whether or not their children were enrolled in the school. The Sniders informed the principal of their home study plan. Later, the Sniders were contacted by the Social Service Department of Henrico County and asked for an interview regarding their children which they agreed to do.

A social service worker was sent to their home on approximately the 13th of October, 1982, and interviewed Mrs. Snider and the children. The social service worker basically was not concerned with the curriculum that the children were studying, although she took a brief glance at some of their text books. As a result of that visit, the social service worker wrote a glowing report of the Snider children's attitude and their apparent education, and also, the general atmosphere in which the children lived. In addition, her report stated that the books the Sniders were using appeared to be grade level appropriate even though she did not closely study the curriculum or the books themselves in regard to the course of study.

As a follow up to the social worker's visit, the Sniders received a phone call asking them to enroll their children in school, and in addition, the social worker said that the Sniders should write a letter to the superintendent of schools stating their position. On October 21, 1982, the Sniders wrote such a letter and explained to the superintendent that they had decided that they wanted a traditional Catholic education for their children. The Sniders stated that they intended to continue their children's enrollment in Our Lady of Victory home study program through the twelfth grade. The Sniders stated in their letter to the superintendent that to put their children in a public school would be to put them in an "occasion of sin", because of the secular atmosphere of the public schools. This would endanger their traditional

Catholic faith. The Sniders received a reply to their October 21, 1982 letter on December 1, 1982, informing them that the superintendent did not doubt the sincerity of their religious convictions; however, they were required under the Code of Virginia to insist that the Sniders enroll their children in a public school or in a school of one kind or another.

On December 8, 1982, the Sniders wrote a follow up letter to their first letter asking the superintendent why he had not considered their religious objections to the public school, particularly since the Code of Virginia makes an exemption for people who have religious objection to enrolling their children in school. Additionally, the superintendent in his letter had stated that the Sniders' home study program from the

school in California was not accredited.

On December 13, 1982, the Sniders received an answer to their second letter in which the superintendent informed the Sniders that the particular part of the Virginia Code the Sniders referred to did not specifically apply to their case because the superintendent had no knowledge of the Catholic church having such a belief.

On March 3, 1983 the Sniders were charged with a violation of the Virginia Compulsory Education Law, Virginia Code § 22.1-254, which led to the two trials in this case.

This case came before the Juvenile and Domestic Relations Court of Henrico County, Virginia, on criminal warrants filed by Ann J. Atkinson, Senior Social Worker, Henrico County School Board, against the Defendants, Richard A. Snider

and Margaret Q. Snider, in which the complaint alleged that the Defendants were in violation of § 22.1-254 of the Code of Virginia, as amended, in that they failed to send their children to a public school between August 20, 1982 and February 28, 1983. The Juvenile and Domestic Relations District Court of Henrico County found that the Defendants, Richard A. Snider and Margaret Q. Snider guilty as charged and ordered that each pay a fine of $100.00 and court costs and the Court further ordered that the Defendants were to enroll their children in the Henrico County school system on Monday, April 11, 1983. The Defendants were admonished by the Court to comply with this Order or they could be subjecting themselves to contempt of Court. Thereafter, the Defendants filed their appeal to the Circuit Court of Henrico

County, Virginia, and trial was set for September 22, 1983. The trial took place on September 22 and 23, 1983, and the Court took the case under advisement pending the filing of a reply brief by counsel for the defendants and final argument by counsel. On October 27, 1983, counsel had final argument and the Court found the Defendants guilty of violating § 22.1-254 of the Code of Virginia. The Court, in upholding the constitutionality of Virginia's compulsory attendance laws, stated:

> "So, the compulsory education laws I find not to be unconstitutional per se, but when we take the compelling State interest and balance it with Mrs. Snider's belief, which she attributes to her religion, I find that the State had provided for lesser restrictive measures than sending her children, than requiring her to send her children to public schools."

The Court also stated that it found the Defendants' beliefs were not theological-

ly based, and therefore, they did not come within the purview of the religious exemption found in Virginia Code §§ 22.1-256 and 22.1-257. The case was continued for final disposition until January 12, 1984.

On January 12, 1984, the Court imposed the costs of the proceeding on the Defendants and ordered them to enroll their two children in public school or private school by the beginning of the next semester of the school year. From this final disposition the Defendants appealed to the Virginia Supreme Court.

By Order dated November 21, 1984, the Virginia Supreme Court refused the petition for Appeal. By Order dated January 18, 1985, the Virginia Supreme Court denied the Petition for Rehearing. From the denial of the Petition for Rehearing, the Appellants appeal this to

the Supreme Court pursuant to 28 U.S.C. § 1257(2).

At the trial in the Henrico Circuit Court, the Commonwealth presented three witnesses, the two social workers who had contact with the Defendants and the Superintendent of Catholic Schools for the Richmond Dioceses. None of these witnesses questioned or rebutted the sincerity of the Sniders' religious beliefs or that they were theologically based.

On the other hand, the defense called a traditional Catholic priest who testified about the traditional Catholic movement and the sincerity of the Sniders' religious beliefs. The defense also called an expert witness, Dr. Phil Suiter, who for several years had been Assistant State Superintendent of Public Instruction for the State of West

Virginia in charge of teacher certification and curriculum development, and who for the last four years had been a Baptist Minister. Dr. Suiter testified that the religion of "secular humanism" permeates public instruction throughout the country. Dr. Suiter testified that he had reviewed the instructional material being used by the Sniders and he interviewed the Snider children and it was his professional opinion that they were receiving at least as good an education as they would receive in the public schools. Dr. Suiter testified that from his interview with the Sniders it was his opinion that the Sniders' religious beliefs about the education of their children were sincerely held religious beliefs. Dr. Suiter testified that if there was a compelling state interest in the education of its children

that the interest was being met in this case by the Sniders and that the balance should fall on the side of free exercise of religion since there were less restrictive alternatives available, but not being used by the Commonwealth. Then the Sniders, particularly Mrs. Snider, testified as to their religious beliefs and those of their children concerning the education of their children.

None of this defense testimony was rebutted by the Commonwealth. Nevertheless, the Court found that the Virginia Compulsory Education Law, Virginia Code § 22.1-254 et seq. constitutional, and that the Sniders' religious beliefs concerning the education of their children were not theologically based and, therefore, they and their children did not qualify for a religious exemption.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

In this case, the Virginia Supreme Court, by denying the Appellants' Petition for Appeal and denying Appellants' Petition for Rehearing, thereby affirmed the Circuit Court of Henrico County, Virginia, validating the Virginia Compulsory Attendance Law, Virginia Code § 22.1-254 at seq. (Tr. of October 27, 1983 hearing at page 71 lines 8 to 15) (Appendix H), and also affirmed the constitutionality of the Virginia Compulsory Attendance Law (Appendix A). The Virginia Compulsory Attendance Law requires parents of school aged children to send their children to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division

superintendent.[1]

The Virginia Compulsory Attendance Law in § 22.1-256 and 257 recognizes a religious exemption from its provisions where any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school. The General Assembly then attempts by use of a negative definition to define the term "bona fide religious training or belief" as not including essentially political, sociological or philosophical views or a merely personal moral code. Therefore, the Virginia General Assembly has attempted by statute to delineate a citizen's rights under the First Amend-

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1 The 1984 Virginia General Assembly amended the Compulsory School Attendance Law to allow for home instruction in accordance with certain guidelines set forth therein. However, this amendment in no way affected the religious exemption procedure set forth in Virginia Code § 22.1-257.

ment to the United States Constitution, thereby placing the statute above the clearly delineated rights guaranteed to the citizens of the Commonwealth by the First and Fourteenth Amendments to the United States Constitution. Such a blatant usurpation of a United States Constitutional mandate cannot be tolerated.

The Virginia General Assembly clearly recognizes a religious exemption to the Compulsory Attendance Law on the one hand and attempts to unconstitutionally limit it on the other. The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..." U.S.CONST. amend I. The free exercise clause of the First Amendment was made applicable to the states, through the

"concept of liberty" embodied in the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

This Court has recently addressed the question of protected religious beliefs or practices in Thomas v. Review Board, 450 U.S. 707 (1981). While recognizing that only beliefs rooted in religion are protected by the Free Exercise Clause, this Court stated:

> "However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Board, 450 U.S. 707, 714.

The Supreme Court of Indiana in Thomas, concluded that Thomas' belief was more "personal philosophical choice" than religious belief. Id. at 713. However, Chief Justice Burger in Thomas stated:

> "Intrafaith differences of that kind are not uncommon among followers of a

particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the religion clauses." Id. at 715.

Chief Justice Burger goes on to state:

"[A]nd the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." Id. at 715 and 716.

In the Virginia Compulsory Attendance Law, particularly Virginia Code § 22.1-257, the Virginia General Assembly attempts to delegate to the local school board the authority to interpret, delineate and restrict a citizen's right to free exercise of religion as guaranteed by the Free Exercise Clause of the First Amendment. This is an unconstitutional usurpation and infringement of the rights guaranteed by the United States

Constitution.

The Equal Protection Clause of the Fourteenth Amendment states: "No state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws." U.S.CONST. amend. XIV § 1.

Under earlier cases, the review used by this Court in equal protection challenges was the traditional standard of restrained review. In discussing statutes, this Court has said: "Statutes create many classifications which do not deny equal protection; it is only 'invideous discrimination' which offends the constitution." Ferguson v. Skrupa, 372 U.S. 726, 732 (1963). Therefore this traditional standard sets forth the rule that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair

and substantial relation to the object of the legislation, so that all persons in similar circumstances shall be treated alike." F.S. Royster Guano Company v. Virginia, 253 U.S. 412, 415 (1920). Thus sets forth the traditional standard which has generally required restrained review by this Court.

However, the new standard used by the Court is active review when government legislates or acts either on the basis of a suspect classification or with regard to a "fundamental" interest. When dealing with a "fundamental" interest the traditional standard of equal protection review is abandoned and the court exercises "strict scrutiny." A government must demonstrate a high degree of need on its part, and apparently, little or no presumption favoring the classification is to be expected where a

fundamental interest is involved. This phase of active review of classification holds that when certain fundamental liberties and rights are involved, government classifications which affect them must be justified by the showing of a compelling interest necessitating the classification and by showing that the distinctions are necessary to further the purpose, a test which virtually no state has succeeded in passing, in any case in which it has been applied. The effect of applying the test is to deny to legislative judgments the deference usually accorded them and to dispense with the general presumption of constitutionality usually given state classifications. Kramer v. Union Free School District, 395 U.S. 621, 627 (1969). There are new and developing areas of fundamental interest. In Zablocki v. Redhail, 434 U.S. 374

(1978) importing into equal protection analysis the doctrine developed in substantive due process, the court identified the right to marry as a fundamental interest that necessitates critical examination of governmental restrictions which "interfere directly or substantially" with the right. Although the court's due process decisions have broadly defined and protected liberty interests in marriage and family, no previous case had held marriage to be a fundamental right occasioning strict scrutiny. Id. 396, 397 (Justice Powell concurring).

To educate one's children in an environment which comports with the religious views sincerely held by the parents and free from the "occasion of sin" found in secular humanism, which permeates public schools and even private

education, is a fundamental right that must require strict scrutiny under the equal protection provision in the Fourteenth Amendment of the United States Constitution. Consequently, when viewed in the light of strict scrutiny, the Virginia Compulsory Attendance Law fails to pass constitutional muster. In one instance, there are students attending private schools that do not require the certification of teachers. In another instance, there are students who are taught at home for religious reasons and this requires a certified teacher or tutor. Additionally, pursuant to the religious exemption parents in the same situation could be granted or denied the exemption based merely on a difference of school boards and superintendents in different locations. It is maintained that there is no rational basis for these

classifications, and consequently these classifications violate the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The Virginia Compulsory Attendance Law violates the Free Exercise Clause of the First Amendment of the United States Constitution and Article I, § 16 of the Virginia Constitution, by impinging on the rights of parents and students to free exercise of religion and parental liberty. In Moore v. City of East Cleveland, 431 U.S. 494 (1977) this Court spoke of the family:

> "[o]ur decisions establish that the constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." Id. at 503-504.

This Court in, Wisconsin v. Yoder, 406 U.S. 205 (1972), stated that the state's interest in universal education, however highly ranked, could not be totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the free exercise clause of the First Amendment, and the traditional interests of the parents with respect to the religious upbringing of their children. Id at 214.

In State of Ohio v. Whisner, 47 Ohio St. 2d 181 (1976), the Ohio Supreme Court struck down state promulgated minimum standards relating to the operation of all schools, including church related private schools. The Court held that the "minimum standards" which were comprehensive in their scope and in fact, unduly burdened the free exercise of religious

rights of the parents and students attending non-public schools.

Among the standards objected to was the "certification as a qualification for hiring a person as a teacher in one of these schools." The Ohio court at page 217-218 stated as follows:

> "[T]he state did not, either in this court or in the lower court, attempt to justify its interest in enforcing the 'minimum standard' as applied to a non-public religious school. In the face of the record before us, in light of the expert testimony...it is difficult to imagine...the state interests of a sufficient magnitude to over ride claiming protection under the free exercise clause... equally difficult to imagine the state interests sufficiently substantial to direct the education of their children. We will not, therefore, attempt to conjure up such an interest in order to sustain the application of the 'minimum standards' to those appellants."

The court in Ohio v. Whisner, supra, also emphasized that "even if the state can establish their requisite degree of interest, it must yet demonstrate that

such interest cannot otherwise be served..." Id

In a New York case, People v. Turner, 98 N.Y.S. 2d 886, (S.Ct. 1950), the court stated as follows in discussing the purpose of a compulsory education statute:

> "[T]he object of a compulsory education law is to see that children are not left in ignorance, that from some source they will receive instruction that will fit them for their place in society. Provided the instruction given is adequate and the sole purpose of non-attendance at school is not to evade the statute, instruction given to a child at home by its parent, who is competent to teach, should satisfy the requirements of the compulsory education law."

The Constitution of the United States mandates, and the courts must fervently keep in mind that if a person is following a defined religious conviction and establishes a sincere belief in such religious conviction, that the state has no right or power to question the

interpretation of those beliefs or to interfere with the free exercise of those beliefs, except in those rare cases where the interest of the state is overwhelming and no less restrictive means of interference could possibly meet or satisfy the state interests. The Appellants have a sincere religious belief which has been documented and no court should interfere with their free exercise of religious belief on the facts in this case. The interests of the state in requiring certification of a teacher or a tutor for home instruction on the facts as contained in this case must give way to the free exercise of religious belief as guaranteed by the First Amendment to the United States Constitution.

Article I, § 16 of the Virginia Constitution states in pertinent part:

> "That religion or the duty which we owe our Creator, and the manner of discharging it, can be directed only

> by reason and conviction, not by force or violence, and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience..."

Thus the free exercise of religion as set forth in the Virginia Constitution recognizes that such exercise shall be according to each person's "dictates of conscience." And this clause takes precedence over Article VIII, § 3 of the Virginia Constitution dealing with compulsory education.

Finally, the Virginia Compulsory Attendance Law usurps the conscientious exercise of responsible parental authority and disrupts the family unit by enforcing state ordained and mandated educational parameters.

In 1925, this Court, in Pierce v. Society of Sisters, 268 U.S. 510 (1925) overturned a state law requiring public school education on the basis of the

parental liberty over education. In overturning the law that effectively forbade parental selection of religious schools, other private schools, or home education, this Court said:

> "T]he act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control...The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id at page 534-35.

In 1944, the Court in Prince v. Massachusetts, 321 U.S. 158 (1944) stated:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Id at 166.

In Wisconsin v. Yoder, supra, this Court stated:

> "The history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. Id at 232.

Again this Court stated in Wisconsin v. Yoder, supra:

> "In the face of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a parens patriae claim of such all-encompassing scope and with such sweeping potential for broad and unforseeable application as that urged by the State." Id at 234.

This Court in finding a violation of the Free Exercise Clause in Wisconsin v. Yoder, supra, stated:

> "The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the

> way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child." Id at 217-18.

In this case, the Commonwealth failed to put on any evidence of a compelling state interest in the compulsory education of its children even though the Circuit Court Judge took judicial notice of what he perceived the compelling state interest to be. (See Appendix H, Transcript of October 27, 1983, pages 70 and 71.) In the test used by this Court in Wisconsin v. Yoder, supra, at 235-236, the First Amendment liberties and fundamental freedoms prevail over a conflicting governmental requirement, such as the Virginia Compulsory Attendance Law, unless the government can demonstrate both that: (1) its requirement is necessitated by a compelling state interest; and (2) that any interest

is accomplished by the least burdensome means. This the Commonwealth wholly failed to do. In fact, the Appellants' expert witness, Dr. Phil Suiter testified that there were less restrictive means of furthering any compelling state interest than those found in the Virginia Compulsory Attendance Law.

Appellants submit that the federal questions presented by the Virginia Compulsory Attendance Law are substantial. This Court should receive briefs on the merits and hold oral argument in order to provide guidance to the states regarding the citizen's right to free exercise of religion in relation to any interest the state might have in educating the children.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

WILLIAM A. BEETON, JR.
Counsel of Record
Gary C. Leedes
3817 Plaza Drive
Fairfax, Virginia 22030
(703) 385-9400
Attorneys for Appellants

APPENDIX A

Order of the Supreme Court of Virginia
(Dated January 18th, 1985)

Record No. 840377
Circuit Court Nos. 83M293 and 83M294

THE SUPREME COURT OF THE
COMMONWEALTH OF VIRGINIA
The State of Virginia, City of Richmond

RICHARD A. SNIDER
and
MARGARET Q. SNIDER,

Appellants,

vs.

COMMONWEALTH OF VIRGINIA,

Appellee.

UPON A PETITION FOR REHEARING

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 21st day of November, 1984, and grant a rehearing thereof, the prayer of the said petition is denied.

APPENDIX B

Order of the Supreme Court of Virginia
(Dated November 21st, 1984)

Record No. 840377
Circuit Court Nos. 83M293 and 83M294

THE SUPREME COURT OF THE
COMMONWEALTH OF VIRGINIA
The State of Virginia, City of Richmond

RICHARD A. SNIDER
and
MARGARET Q. SNIDER,

Appellants,

vs.

COMMONWEALTH OF VIRGINIA,

Appellee.

FROM THE CIRCUIT COURT OF HENRICO COUNTY

Upon review of the record in this case and consideration to the granting of an appeal, the Court is of opinion there is no reversible error in the judgments complained of. Accordingly, the Court refuses the petition for appeal.

APPENDIX C

Order of the Circuit Court of Henrico County, Virginia
(Dated December 12th, 1983)

Order - Case No. 83M293

THE CIRCUIT COURT OF
HENRICO COUNTY, VIRGINIA

COMMONWEALTH OF VIRGINIA,

Appellee,

vs.

RICHARD A. SNIDER,

Appellant

ORDER

This day came the attorney for the Commonwealth, and the defendant in person with his attorney William A. Beeton, Jr.

On October 27, 1983, the Court found the defendant guilty of failing to send his children to public school (Virginia Code Section 22.1-254), and continued this case for final disposition to this

day to allow the attorney for the Commonwealth to have Dr. Bosher present to explain the criteria for qualification of tutors or teachers.

The Court considering all of the evidence and argument of counsel, hereby Orders that the defendant pay the costs of these proceedings in the amount of $58.00 by March 15, 1984, at 3:00 o'clock p.m., and further that the defendant enroll his children in a public or private school in compliance with Virginia Code Section 22.1-254 beginning with the next school semester.

Thereupon, the defendant was allowed to depart.

The Clerk is dircted to forward an attested copy of this Order by certified mail to the defendant at 1409 Maryland Ave., Glen Allen, VA 23060, and that a certified copy of this Order be mailed to

the Attorney for the Commonwealth and to William A. Beeton, Jr., Esquire, 12 Culpeper Street, Warrenton, Virginia 22186.

JUDGE BYRNE

APPENDIX D

Order of the Circuit Court of Henrico County, Virginia
(Dated December 12th, 1983)

Order - Case No. 83M294

THE CIRCUIT COURT OF
HENRICO COUNTY, VIRGINIA

COMMONWEALTH OF VIRGINIA,

Appellee,

vs.

MARGARET Q. SNIDER,

Appellant

ORDER

This day came the attorney for the Commonwealth, and the defendant in person with her attorney William A. Beeton, Jr.

On October 27, 1983, the Court found the defendant guilty of failing to send her children to public school (Virginia Code Section 22.1-254), and continued this case for final disposition to this

the Attorney for the Commonwealth and to William A. Beeton, Jr., Esquire, 12 Culpeper Street, Warrenton, Virginia 22186.

JUDGE BYRNE

APPENDIX E

Order of the Circuit Court of Henrico County, Virginia
(Dated November 30th, 1984)

Order - Case No. 83M293

THE CIRCUIT COURT OF
HENRICO COUNTY, VIRGINIA

COMMONWEALTH OF VIRGINIA,

Appellee,

vs.

RICHARD A. SNIDER,

Appellant

ORDER

This Court having received the Order of the Supreme Court of Virginia dated November 21, 1984, wherein that Court set forth that the Petition for Writ of Error was maturely considered, and finding no reversible error in the judgment of this Court, refused the defendant's petition for appeal thereby affirming the judgment

of this Court, it is

ORDERED that the judgment entered in this case on December 12, 1983, is now imposed and the defendant is Ordered to enroll his children in a public or a private school in compliance with Virginia Code Section 22.1-254 beginning with the next school semester. It is further Ordered that the defendant pay, and the Commonwealth recover, $58.00 costs in the trial of this case in the Circuit Court, by January 17, 1985, at 3:00 o'clock p.m., as stated in the Show Cause Order entered this day.

The Clerk is directed to have an attested copy of this Order and a copy of the said Show Cause Order served on the defendant at 1409 Maryland Ave., Glen Allen, Virginia 23060, by the Sheriff of this County, and an attested copy of this Order forwarded to the Attorney for the

Commonwealth, and to William A. Beeton, Jr., counsel for the defendant, at 12 Culpeper Street, Warrenton, Virginia 22186.

L. PAUL BYRNE

Judge

APPENDIX F

Order of the Circuit Court of Henrico County, Virginia
(Dated November 30th, 1984)

Order - Case No. 83M294

THE CIRCUIT COURT OF
HENRICO COUNTY, VIRGINIA

COMMONWEALTH OF VIRGINIA,

Appellee,

vs.

MARGARET Q. SNIDER,

Appellant

ORDER

This Court having received the Order of the Supreme Court of Virginia dated November 21, 1984, wherein that Court set forth that the Petition for Writ of Error was maturely considered, and finding no reversible error in the judgment of this Court, refused the defendant's petition for appeal thereby affirming the judgment

of this Court, it is

ORDERED that the judgment entered in this case on December 12, 1983, is now imposed and the defendant is Ordered to enroll her children in a public or a private school in compliance with Virginia Code Section 22.1-254 beginning with the next school semester. It is further Ordered that the defendant pay, and the Commonwealth recover, $58.00 costs in the trial of this case in the Circuit Court, by January 17, 1985, at 3:00 o'clock p.m., as stated in the Show Cause Order entered this day.

The Clerk is directed to have an attested copy of this Order and a copy of the said Show Cause Order served on the defendant at 1409 Maryland Ave., Glen Allen, Virginia 23060, by the Sheriff of this County, and an attested copy of this Order forwarded to the Attorney for the

Commonwealth, and to William A. Beeton, Jr., counsel for the defendant, at 12 Culpeper Street, Warrenton, Virginia 22186.

L. PAUL BYRNE

Judge

APPENDIX G

In the Supreme Court of Virginia

~~(Dated January 18th, 1984)~~

FILE DATE APRIL 16, 1985

Record No. 840377

THE SUPREME COURT OF THE
COMMONWEALTH OF VIRGINIA
The State of Virginia, City of Richmond

RICHARD A. SNIDER
and
MARGARET Q. SNIDER,

Petitioners,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

AMENDED NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Pursuant to Rule 10 of the Rules of the United States Supreme Court, the Defendants below, Petitioners herein, Richard A. Snider and Margaret Q. Snider previously filed with this Court a Notice of Appeal to the United States Supreme

Court of the Judgment of this Court dated January 18, 1985 denying their Petition for a Rehearing.

Said Notice of Appeal did not specifically set forth the statute or statutes under which the appeal to the United States Supreme Court is taken.

NOW WHEREFORE, the Defendants below, Petitioners herein, Richard A. Snider and Margaret Q. Snider, file this Amended Notice of Appeal to the United States Supreme Court specifically setting forth that the Appeal to the United States Supreme Court is pursuant to 28 U.S.C. § 1257 (2).

Respectfully Submitted
Richard A. Snider
Margaret Q. Snider

By: William A. Beeton, Jr.
Counsel for Petitioners
3817 Plaza Drive
Fairfax, Virginia 22030
(703) 385-9400

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was mailed, postage prepaid, to the Commonwealth of Virginia represented by B. Craig Dunkum, Esquire, Assistant Commonwealth's Attorney, County of Henrico, Virginia 23273, telephone no. (804) 747-4218 this 16th day of April, 1985.

WILLIAM A. BEETON, JR.

APPENDIX H

Transcripts of the Circuit Court of Henrico County, Virginia
(Dated October 27th, 1983)

No. 83M293-4

THE CIRCUIT COURT OF
HENRICO COUNTY, VIRGINIA

COUNTY OF HENRICO,

Appellee,

vs.

RICHARD A. SNIDER,

Appellant

MR. DUNKUM [Commonwealth's Attorney]: Secondly, the second issue raised is are the defendants exempt from 22.1-254 by reason of Section 22.1-257. I think the terminology is wrong that the defense has used in its brief or in its memorandum, and the statute, I believe, says excuse. I don't know the difference between the connotation, but to excuse shows some--

THE COURT: Well, exempt would mean they might automatically. Excused means they have to be excused by someone in authority. [p. 5]

THE COURT: I have a reference to the argument. I didn't take it down as the O'Toole family. I heard, my notes show that Mrs. Snider testified that other families are keeping their children at home and have permission to do so, and they are traditional Catholics. I didn't get it as a specific case. I got it as more than one family, other families, I thought she said. That's what I was looking for. I don't have any problem with finding that the Sniders are sincere in their beliefs. I think that some of the sincerity is of recent vintage. When I look at the facts in the case, I don't think the facts are really in issue. I think that the Encyclicals that Mrs.

Snider relies upon as a tenet of faith is one that deals with primarily the education of the Catholic children in the Catholic faith. I think she takes it a little far when she carries into the education in other fields. I find nothing in this case from my personal knowledge of the Catholic faith and from the evidence here, even from the traditional Catholic evidence that was here, anything that prohibits these children from attending public school, or parochial school, or being taught in the home. I think the defendants' position, rather than being theological in nature, is philosophical. There are philosophical differences even within her own religion. Because from other testimony, there are traditional Catholics that send their children to parochial school, private school, and public school, and,

they are not sinning in the eyes of the church. I think she had a sincere belief. This Court finds that her belief is based upon a philosophical interpretation of the traditional Catholic faith, and is not based in theology.

Now, I understand the Catholics believe that the Pope is infallible, but only when he deals with questions of dogma doctrine of the church. When he deals with secular issues that may involve the church, he is not infallible with reference to that. Of course, if we go back to the beginning of Christianity, or even to the beginning of the world, or the universe, and we accept the interpretation from the Old Testament that God, in establishing the universe, stated that he would work for six days and rest on the seventh, that has been subject to many interpretations, that Saturday is

the Sabbath, and not Sunday, as the Christians held. In the Catholic church, even today, that has gone beyond that and permits you to meet your responsibilities of attending mass on Sunday and holy days which is permitting you to go on Saturday evening, rather than Sunday, which would have been unheard of when I came along. You always went to church on Sunday. You couldn't go on Saturday and satisfy your obligations under the pain of sin to mass on Sunday. The same thing with reference to the requirement of not eating meat on Friday. That was also a sin by the Encyclicals of the church. But, it had many dispensations. If you were ill, if you were a certain age, then it didn't apply to you. It was always a basis for that in history, although it was jokingly said many times it was also for the benefit of the economy of the fish

merchant in Southern Italy, and, she laughs, and I used to laugh too. We used to say that many times, that was the only reason for not eating meat on Friday, because they wanted to protect the fish industry for the fishermen in Southern Italy.

This is a difficult case. I recognize the parents' primary responsibility for the raising, nurturing, educating and welfare of their children. I think that is not only given to them by godly fear, but also under the common law they're charged with their responsibility. But, I think that in these cases, even though this is a criminal case, and not a civil case as in Grigg, that the strict scrutiny case is inapplicable. Then, we have come to a balancing test. Let me say one thing. I am not satisfied in my mind that this lady is a bad teacher.

And, I am not satisfied in my mind that her children are going to grow up with less education than they would get in the public schools. In fact, history would weigh in her favor, to some extent because from my own experience, and I attended both parochial schools and public schools, that when I left the parochial school to go to the public school, I was one grade level higher in the 7th grade in parochial than they were in public schools. I went to public school as a freshman in high school and didn't have to go to any classes with regard to the first semester of high school. I just took the exams and the second semester I had had half of what they were having. I already had that in the 7th grade, half of what they were having in the second semester of high school. I am not unaware of the dif-

ferences in quality is what I am trying to say, as education between public, parochial and private schools. I am not unaware of the changes in the Catholic church since Vatican II, but I have some concern when the traditional Catholic breaks from the Catholic church, but doesn't break from the church in Rome, which means subjectively, they want to remain Roman Catholic, but apply their own conclusions as to how far they are going to participate as Roman Catholics. And, of course, Luther took that argument back many years ago in Germany and the church in Rome declared him to be heretical and I think that gave him a choice, either get in line, or get out, and he got out.

Of course, the church isn't that militant now. I agree with that. However, I don't think the Commonwealth

has to prove defacto the compelling State interest, which Mr. Beeton argued. I think the compelling State interest of the State in public education can be taken from the constitutional provisions and also the statutory provisions. The Court doesn't live in a vacuum. The compelling State interest in education or compulsory education, when I say public education, that is wrong, it should be compulsory education is to show that we don't have an illiterate society that cannot function because they are illiterate. So, the compulsory education laws I find not to be unconstitutional per se, but when we take the compelling State interest and balance it with Mrs. Snider's belief, which she attributes to her religion, I find that the State had provided for lesser restrictive measures than sending her children, than requiring

her to send her children to public schools.

The statute itself has an alternative. One, she can either send them to parochial school or private school, or she can teach them at home with a qualified tutor, approved by the School Board. I am not ready to overrule the Supreme Court in Grigg v. Commonwealth just yet and declare that the statute doesn't meet constitutional muster, when they just decided that it did. In 222 Virginia, 356, when they decided that on December 3, 1982, somehow this is not to say that there is only room for improvement in the statute and that there isn't room for improvement in the administration of the statute. I have no idea, it is not before me as to what the criteria for having this lady approved as a tutor of her children would be. Nobody has

told me that. I don't think I can look beyond the evidence that is beyond the Court. The statute is defective in those respects. It is a matter for the Legislature, not this Court. This Court doesn't make the law. It interprets it, and administers the law.

I don't think that Mr. and Mrs. Snider come under the Yoder umbrella even though they argued that the Catholic faith goes back to 33 A.D. and has been in existence for 2,000 years. Because the Catholic church in my lifetime has never had a tenet of faith, and I don't think it does now, from the evidence before the Court, even the traditional Catholics are not living in sin or excommunicated from the church because their children are sent to public schools, or sent to parochial schools, or sent to private schools. If we were to

allow every parent because of a philosophical difference, not based on theology, to determine that they were going to set up their own school in their home and educate their children, regardless of the compulsory school law, I think it would be catastrophy. We all know when we look around there are parents who are incapable of educating their children due to handicaps, either from lack of education themselves, or physical handicaps, such as being deaf or blind, things of that nature. I don't have any trouble finding that they are sincere. She is just as sincere as she can be. But, I don't think it is based on theology. It's based on a difference of philosophy, and the statute says it can't be based on philosophy.

I am going to have to find Mr. and Mrs. Snider guilty of a violation of the

law because in my opinion they have violated the law. However, this is not the flagrant violation the Court usually deals with when it has to impose punishment. I am going to require them to pay the cost of these proceedings, and order them to enroll their children and order them to comply with the statute. If she can get herself qualified as a tutor, I have no objection for what she is doing, because from all the evidence before the Court, her children are at grade level or above. And, I agree with Dr. Suiter to some extent, we should stop looking at the size of the facility. [pp. 66-73]

Office - Supreme Court, U.S.
FILED
JUN 3 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1724

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1984

RICHARD A. SNIDER
and
MARGARET Q. SNIDER
Appellants,

vs.

COMMONWEALTH OF VIRGINIA
Appellee.

On Appeal From the Supreme Ccurt
Of the Commonwealth of Virginia

MOTION TO DISMISS OR AFFIRM

H. Albert Nance, Jr.
Counsel of Record
Henrico Commonwealth's
Attorney's Office
P. O. Box 27032
Richmond, Virginia 23273

Counsel for Appellee

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Was there a substantial federal
estion raised by Appellants in the State
urts which is worthy of consideration?

a. Was the question of whether
rginia Code Sections 22.1-254 and 22.1-257,
aling with compulsory school attendance,
e violative of the First and Fourteenth
endments to the United States Constitution
plicitly considered by the Virginia Supreme
urt in denying the petition for appeal?

b. Was the decision of the Vir-
nia Supreme Court based solely on questions
fact as determined by the Circuit Court of
e County of Henrico?

c. In light of the fact that for-
r Virginia Code Sections 22.1-254 and 22.1-
4 track the language used by the United
ates Supreme Court in Wisconsin v. Yoder,

406 U.S. 205 (1972), and that other cases, such as Rivinius v. North Dakota, 328 N.W. 2d 220 (1982), cert. denied 103 S. Ct. 1525 (April 4, 1983), have presented similar questions, is there a substantial question given the broad discretion of the legislature and the alternatives provided within the statutory provisions?

d. Are the issues presented by Appellants moot since Virginia Code Section 22.1-254, dealing with compulsory school attendance, was amended by the Virginia General Assembly in July of 1984, and at the same time altered by the addition of Virginia Code Section 22.1-254.1?

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NO. 84-1724

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

RICHARD A. SNIDER
and
MARGARET Q. SNIDER
Appellants,

vs.

COMMONWEALTH OF VIRGINIA
Appellee.

On Appeal From the Supreme Court
Of the Commonwealth of Virginia

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Virginia on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

PROCEEDINGS BELOW

Appellants were charged with violating Virginia Code Section 22.1-254, in that they failed to comply with that section by teaching their children at home between August 30, 1982 and February 28, 1983. Appellants were found guilty as charged in the Juvenile and Domestic Relations District Court of the County of Henrico, the Order of such convictions being dated April 15, 1983.

The Circuit Court of the County of Henrico considered their appeal, and on October 27, 1983 found Appellants guilty of violating Virginia Code Section 22.1-254, but continued the case for final disposition until December 12, 1983, at which time the costs of court were assessed against Appellants and they were ordered to comply with Virginia Code Section 22.1-254.

The Supreme Court of Virginia, after a review of the record and consideration of the arguments submitted, found no reversible error in the judgments of the Henrico County Circuit Court and refused Appellants' petition for appeal in an Order dated November 21, 1984. On consideration of Appellants' petition for rehearing the Supreme Court of Virginia denied such petition in an order dated January 18, 1985.

The Commonwealth of Virginia was first made aware of Appellants' appeal to the United States Supreme Court by receipt of the jurisdictional statement on May 6, 1985.

JURISDICTION

Appellants allege jurisdiction based on the refusal by the Virginia Supreme Court of their petition for appeal and subsequent petition for rehearing from the judgment of

the Henrico County Circuit Court, which became final as a result of the action of the Virginia Supreme Court. This judgment found Appellants guilty of violating Virginia Code Section 22.1-254.

STATUTES INVOLVED

Virginia Code Section 22.1-254, as it read prior to July 1, 1984, states as follows:

> Ages of children required to attend.--Every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before October thirty-first of the 1980-1981 school year and September thirtieth of any school year thereafter and who has not passed the seventeenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent.

Virginia Code Section 22.1-257 reads as follows:

> Excusing children who cannot benefit from education or whose parents conscientiously object; excusing children for reasons of health or apprehension for personal safety.--
>
> A. A school board:
>
> 1. May, on recommendation of the principal and the division superintendent, with the written consent of the parent or guardian, excuse from attendance at school any pupil who the school board determines, in accordance with regulations of the Board of Education, cannot benefit from education at such school;
>
> 2. Shall excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school;
>
> 3. Shall, on the recommendation of the juvenile and domestic relations district court of the county or city in which the pupil resides, excuse from attendance at school for such period of time as the court deems appropriate any pupil who, together with his parents, is opposed to attendance at a school by reason of concern for such pupil's health, as verified by competent medical evidence, or by reason of such pupil's reasonable apprehension for personal safety when such concern or apprehension in that pupil's specific case is determined by the court to be justified;

4. May, on recommendation of the juvenile and domestic relations district court of the county or city in which the pupil resides, excuse from attendance at school any pupil who, in the judgment of such court, cannot benefit from education at such school.

B. The court in reaching its determination as to whether the concern or apprehension referred to in paragraph A3 of this section is justified shall take into consideration the recommendation of the principal and division superintendent.

C. As used in paragraph A2 of this section, the term "bona fide religious training or belief" does not include essentially political, sociological or philosophical views or a merely personal moral code.

Virginia Code Section 22.1-263 reads as follows:

Violation constitutes misdemeanor.-- Any person violating the provisions of Section 22.1-254 or 22.1-255 shall be guilty of a Class 4 misdemeanor.

Virginia Code Section 18.2-11 reads as follows:

Punishment for conviction of misdemeanor.-- The authorized punishments for conviction of a misdemeanor are:

(a) For Class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than $1,000, either or both.

(b) For Class 2 misdemeanors, confinement in jail for not more than six months and a fine of not more than $500, either or both.

(c) For Class 3 misdemeanors, a fine of not more than $500.

(d) For Class 4 misdemeanors, a fine of not more than $100.

Virginia Code Section 22.1-254, which became effective July 1, 1984, reads as follows:

> Ages of children required to attend.--Every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before October 31 of the 1980-1981 school year and September 30 of any school year thereafter and who has not passed the seventeenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent or provide for home

> instruction of such child as described in Section 22.1-254.1. Instruction in the home of a child or children by the parent, guardian or other person having control or charge of such child or children shall not be classified or defined as a private, denominational or parochial school.

Virginia Code Section 22.1-254, which also became effective July 1, 1984, reads as follows:

> Declaration of policy; requirements for home instruction of children.--
> A. When the requirements of this section have been satisfied, instruction of children by their parents in their home is an acceptable alternative form of education under the policy of the Commonwealth of Virginia. Any parent of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the seventeenth birthday may elect to provide home instruction in lieu of school attendance if he (i) holds a baccalaureate degree in any subject from an accredited institution of higher education; or (ii) is a teacher of qualifications prescribed by the Board of Education; or (iii) has enrolled the child or children in a correspondence course approved by the Board of Education; or (iv)

provides a program of study or curriculum which, in the judgment of the division superintendent, includes the standards of learning objectives adopted by the Board of Education for language arts and mathematics and provides evidence that the parent is able to provide an adequate education for the child.

B. Any parent who elects to provide home instruction in lieu of school attendance shall annually notify the division superintendent in August of his intention to so instruct the child and provide a description of the curriculum to be followed for the coming year and evidence of having met one of the criteria for providing home instruction as required by paragraph A of this section. The division superintendent shall notify the Superintendent of Public Instruction of the persons approved to provide home instruction.

C. The parent who elects to provide home instruction shall provide the division superintendent by August 1 following the school year in which the child has received home instruction with either (i) evidence that the child has attained a composite score above the fortieth percentile on a battery of achievement tests which have been approved by the Board of Education for use in the public schools or (ii) an evaluation

or assessment which, in the judgment of the division superintendent, indicates that the child is achieving an adequate level of educational growth and progress.

In the event that evidence of progress as required in this paragraph is not provided by the parent, home instruction shall cease and the parent shall make other arrangements for the education of the child which comply with Section 22.1-254 of the Code of Virginia.

D. For purposes of this section, "parent" means the biological parent or adoptive parent, guardian or other person having control or charge of a child.

Nothing in this section shall prohibit a pupil and his parents from obtaining an excuse from school attendance by reason of bona fide religious training or belief pursuant to Section 22.1-257 of this Code.

E. Any party aggrieved by a decision of the division superintendent may appeal his decision within thirty days to an independent hearing officer. The independent hearing officer shall be chosen from the list maintained by the Executive Secretary of the Supreme Court for hearing appeals of the placements of handicapped children. The costs of the hearing shall be borne by the party appealing.

STATEMENT

Richard A. Snider and Margaret Q. Snider, who claim to be members of the traditional Catholic faith, Mrs. Snider having joined the Pius X Movement in 1977 and Mr. Snider having joined in April of 1983, have two children, Dominique, age 10, and Aaron, age 12. Mr. and Mrs. Snider placed their children in Hanover Academy, a private school, in 1981 and 1982; however, Mrs. Snider began teaching the children at home at the beginning of the 1982-83 school year without approval of the School Board under the guidelines of a home correspondence course. They were subsequently charged with violating Virginia Code Section 22.1-254.

Virginia Code Section 22.1-254 required parents to send their school age children to a public, private, denominational or parochial school or have such children

taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent. In conjunction, Virginia Code Section 22.1-257 provides that a school board shall excuse from attendance at school any pupil who, together with his parents, by reason of bona fide religious training or belief, is conscientiously opposed to attendance at school; that section provides that the term bona fide religious training or belief does not include essentially political, sociological, or philosophical views or a merely personal moral code. Mr. and Mrs. Snider contended that their children should be excused under Virginia Code Section 22.1-257 from attending school based upon their religion and that Mrs. Snider should be allowed to instruct them at home with the correspondance course materials. However, the school board

did not excuse the Snider children under Virginia Code Section 22.1-257 as they determined that Mr. and Mrs. Snider did not have bona fide religious beliefs that would prevent them from complying with some portion of Virginia Code Section 22.1-254. In fact, the school board attempted to aid Mrs. Snider in becoming qualified to teach her children at home.

During the trial in the Henrico County Circuit Court, Father Ronald J. Ringrose, who was offered as an expert in the traditional Catholic faith, testified on behalf of the Sniders. On cross-examination, he admitted that there had been no real change in the Catholic beliefs from 33 to 1962 and that prior to 1962, there were no tenets within the Catholic church that would have forced parents not to send their children to school. In fact, he testified that

most Catholic parents sent their children to either a public, private or parochial school. Father Ringrose further admitted that the Catholic faith had never and still does not say a child cannot be educated in either a public, private, or parochial school and that prior to 1962, there was little resistance by parents to children attending school. In regard to the Sniders, Father Ringrose testified that they had arrived at their convictions regarding school based upon their beliefs as to what occasions of sin they could reasonably expose their children to, and further admitted that other members of the traditional Catholic movement do send their children to public, private, or parochial schools and are obeying their convictions and the tenets of their faith in so doing. He further admitted that one alternative for

the Sniders would be to have their children taught at home by someone other than their mother or father who was approved by the school board.

Mrs. Snider testified that she became a traditional Catholic in 1977 although she had been a member of the Catholic faith all her life and had been educated in the Catholic schools rather than at home. She also admitted that her children were attending Hanover Academy in 1981 and 1982 and that she was not aware of the Encyclicals of her faith regarding education when she allowed them to attend such a school. She also agreed that they were withdrawn partially because of financial reasons. Regarding her faith, she stated that she and her husband decided what was right or wrong for their children and what occasions of sin they would allow them to be exposed to, this decision being a subjective

one that they arrived at personally. Mrs. Snider admittedly makes concessions regarding what occasions of sin her children are exposed to and agreed that other members of her faith send their children to some type of school. She stated, however, that she would cooperate with the civil authorities until it became immoral, a standard that she would decide upon, and that she was not answerable to the State or the Courts regarding her children's education.

Mr. Snider testified that he became a member of the Traditional Catholic faith in April of 1983, subsequent to the offense date in this case, but had acquired many of the beliefs from his wife prior to their decision to keep the children at home. He further stated that he was raised in the Protestant faith, attended public schools,

and that the choice of how his children are educated is left with him and his wife.

Clearly, there was no evidence presented that the Catholic faith, either traditional or modern, prohibits the Snider children from attending either a public, private or parochial school, or from being taught in the home by an approved tutor. Since there are other members of her faith who send their children to some kind of school and are not sinning in the eyes of the church and, because she makes the decisions as to what activities the children will be allowed to be involved in, Mrs. Snider's beliefs, while sincere, are philosophical and moral rather than rooted in religion. Having heard all the testimony, the trial court decided, as a matter of fact, that the Sniders' religious beliefs

were not rooted in the Catholic theology, but constituted philosophical views that differed from other members of their faith.

FEDERAL QUESTION

Was there a substantial Federal question raised by Appellants in the State courts which is worthy of consideration?

a. Was the question of whether Virginia Code Sections 22.1-254 and 22.1-257, dealing with compulsory school attendance, are violative of the First and Fourteenth Amendments to the United States Constitution explicitly considered by the Virginia Supreme Court in denying the petition for appeal?

Where the highest state court assumes or holds that a federal question is properly before it and then considers and disposes of that issue, a federal question can be said to have been raised in state court. In cases where a record of the state's highest court decision exists, this determination is easily made; however, in a case such as

this, where the Virginia Supreme Court merely recites in the opinion that, "upon review of the record in this case and consideration to the granting of an appeal, the Court is of opinion there is no reversible error in the judgments complained of," this determination cannot be made. Therefore, it cannot be said that the Virginia Supreme Court, in response to Appellants' petition before that court, explicitly decided any federal question. Absent such a determination, it is respectfully submitted that the Supreme Court of the United States is without jurisdiction under 28 U.S.C. Section 1257(2).

b. Was the decision of the Virginia Supreme Court based solely on questions of fact as determined by the Circuit Court of the County of Henrico?

Clearly, there was a factual determination made by the Circuit Court of the County of Henrico regarding the nature and

sincerity of Appellants' beliefs regarding the education of their children, this being a threshold question to any constitutional issue. The fact finder concluded that Appellants' beliefs, while sincere, were not based on their religion, but were merely philosophical and personal differences occurring within the Catholic faith and even within the Pius X movement of which the Sniders were members. In view of all the testimony it was determined as a matter of fact that the Sniders decided what was right or wrong for their children based on their subjective personal standards and that neither the modern or traditional Catholic faith mandates non-attendance of children in public, private or parochial schools. Furthermore, it was established that Appellants were not violating the tenets of their faith by complying with the Virginia statute

and that other members of their movement did comply by sending their children to school or having them taught by an approved tutor, thus pointing to the different philosophical views within the religious movement espoused by the Sniders. It was not established factually that there were other members of the Sniders' sect who held the same beliefs regarding the education of their children.

Assuming the Virginia Supreme Court accepted these findings of fact, which by case law, unless plainly wrong, would have to be accepted, this case could have been decided without considering any federal questions. If the beliefs of the Sniders regarding the Virginia compulsory school attendance statutes were not based on religion, then there were no constitutional questions to be decided.

The Supreme Court of the United States should not examine the state court's conclusions of fact, since the decision could have been based wholly on these determinations and not on federal constitutional grounds.

c. In view of the fact that former Virginia Code Sections 22.1-254 and 22.1-257 track the language used by the United States Supreme Court in Wisconsin v. Yoder, 406 U.S. 205 (1972), and that other cases, such as Rivinius v. North Dakota, 328 N.W. 2d 220 (1982); cert. denied 103 S. Ct. 1525 (April 4, 1983), have presented similar questions, is there a substantial federal question given the broad discretion of the legislature and the alternative provided within the statutory provisions?

In the landmark case of Wisconsin v. Yoder, 406 U.S. 205 (1972), the United States Supreme Court announced the standards by which cases involving compulsory school attendance laws would be judged. This Court found that, "there is no doubt

as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." While deciding that the Amish had made, "a convincing showing, one that probably few other religious groups or sects could make, "this Court went on to state that,

> A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief . . . [t]hus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious and such belief does not rise to the demands of the Religion Clauses.

Using similar language, former Virginia Code Sections 22.1-254 and 22.1-257 carved out exemptions which provided for legitimate and sincere religious beliefs, and, in addition, provided alternative methods by which its citizens could comply with the law. These alternatives and exemptions seemed to follow the language used in Yoder (Virginia Code Section 22.1-257(A)(2) and 22.1-257(c)) and provided a built-in balancing process in the statute by which the aims of state education and the proper exercise of first amendment free exercise rights could be met.

In the wake of Yoder, other cases have been considered, but the threshold question continues to be the sincerity and theological basis of belief asserted by the parents. In Rivinius v. North Dakota, 328 N.W. 2d 220 (1982), cert. denied 103 S. Ct. 1525 (April 4, 1983), it was

pointed out that, "a showing of a sincerely held religious belief is necessary to prevent a limitless excuse for avoiding all unwanted legal obligations and a group's word cannot automatically be accepted if a religious exemption is at issue."

The legislature of Virginia considered these factors in enacting former Virginia Code Sections 22.1-254 and 22.1-257, and because of the language used in the statutes and the balancing process which was built in, the broad discretion which state legislatures have should not be questioned absent the convincing showing of a valid claim concerning the constitutionality of these statutes.

d. Are the issues presented by Appellants moot since Virginia Code Section 22.1-254, dealing with compulsory school attendance, was amended by the Virginia

General Assembly in July of 1984, and at the same time altered by the addition of Virginia Code Section 22.1-254.1?

Effective July 1, 1984, the Virginia General Assembly amended Virginia Code Section 22.1-254 and added 22.1-254.1, in an attempt to refine its provisions regarding home instruction. While these changes did not alter the nature of the provision, they did provide additional guidelines for the approval of home instruction. These changes brought Virginia's compulsory attendance law even further in line with accepted federal constitutional standards. These changes tend to make Appellants' claims moot, especially in regard to any equal protection argument, since the legislature chose to further delineate the provisions of Virginia Code Section 22.1-254 in spite of

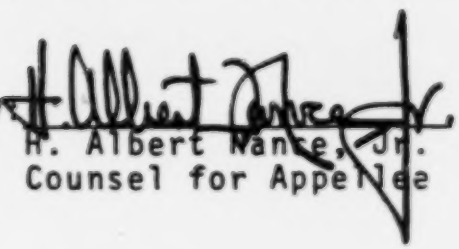
the favorable holding in Grigg v. Commonwealth, 224 Va. 356 (1982).

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Virginia.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By 

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No. 84-1724

In the Supreme Court of the United States

October Term, 1984

RICHARD A. SNIDER
and
MARGARET Q. SNIDER
Appellants,

vs.

COMMONWEALTH OF VIRGINIA
Appellee.

On Appeal From the Supreme Court
Of the Commonwealth of Virginia

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Are a dissenting Roman Catholic family's religious convictions protected by the United States Constitution, if their interpretation of sacred encyclicals differs from the current theology of the Vatican and several other traditional Catholics?

2. Is the Virginia Supreme Court's decision, which upheld the constitutionality of the challenged Virginia Code sections, moot?

3. Is the argument that the case involves the sufficiency of the evidence rather than a federal question a red herring?

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October Term, 1984

RICHARD A. SNIDER

and

MARGARET Q. SNIDER

Appellants,

VS.

COMMONWEALTH OF VIRGINIA

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF VIRGINIA

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

This Appeal presents the following substantial federal question: Whether a dissenting Roman Catholic family's religious convictions are protected by the United States Constitution, if their interpretation of sacred Encyclicals

differs from the current theology of the Vatican and several other traditional Catholics.

Although Appellee's Motion to Dismiss downplays the nationwide importance of this case, the important threshold question presented by this Appeal involves a constitutionally significant definitional problem: What is a religion?

Virginia Code Section 22.1-257 in paragraph A(2) provides that "A school board...[s]hall excuse from attendance at school any pupil who, together with his parents, by reason of **bona fide** religious training or belief, is conscientiously opposed to attendance at school" (emphasis added). Appellants do not qualify for this exemption.

The state courts have held that Appellants' religious convictions,

concerning education, stem from a "philosophical difference [with Catholic church authorities] not based on theology." See page A-20 of "Jurisdictional Statement" (hereinafter abbreviated as J.S.). The trial judge found specifically that the religious convictions of Mrs. Snider "are not based in (sic) theology." (J.S., A-15). Accordingly, the Virginia courts held that, in Appellants' case, "strict scrutiny...is inapplicable." (J.S., A-17).

The state courts erred by assuming that the religion clauses of the United States Constitution protect only religious beliefs of people well versed in theology. Clearly, the religion clauses of the United States Constitution, unlike the challenged Virginia Code Sections do not require a person's religious

convictions to be "theological in nature." (J.S., A-14). Cf. Torcaso v. Watkins, 367 U.S. 488(1961), United States v. Seeger, 380 U.S. 163 (1965), Welsh v. United States, 398 U.S. 333(1970). Obviously, substantial federal questions are presented when an American Catholic's dissent from the Vatican's view of sin is viewed merely as a philosophical difference that is unprotected by the First Amendment's religion clauses.

Appellants are members of a traditional Roman Catholic fellowship that does not accept many of Vatican II's changes in church doctrine. (Tr. dated September 22, 1983, pp.4-12). Appellant, Margaret Q. Snider, explained that traditional Roman Catholics are "not bound to accept anything that would break from tradition [since] if something is an eternal truth

you can't all of a sudden, after 1,960 years, change it." (Tr. p.35). The trial judge based his findings on the following reasoning: "I have some concern," he stated, "when the traditional Catholic breaks from the Catholic Church, but doesn't break from the church in Rome, which means subjectively, they want to...apply their own conclusions as to how far they are going to participate as Roman Catholics." (J.S., A-17-18.).

The trial judge, however, did not want to listen to all of the Encyclicals from which Mrs. Snider derived her religious convictions concerning her children's education. (Tr. p.18). Forced to generalize, Mrs. Snider explained what "she believes she is supposed to do" (Tr. p.18) and how she is constrained by the Encyclicals (Tr. pp.19-20) and canons of her church (Tr. p.28). For example, Mrs.

Snider, after referring to the "deadly sin of impiety," (Tr. pp.27-28) testified, "I am required to have my children's curriculum...God-centered. That means that God must permeate every facet of their instruction." (Tr. p.21). She also testified it is "necessary" to educate my children as Catholics at home in "every subject." (Tr. p.36). "For [concerning] the education of my children...I am responsible to God..." (Tr. pp.60-61). The trial judge conceded that "the parents' primary responsibility for the...educating...of their children...is...given to them by godly fear." (J.S., A-16).

The error of the state courts lies in their **characterization** of the evidence, which, admittedly, shows Appellants to be fundamentalists resisting the winds of theological change. [For a discussion of

the characterization problem, see Johnson, Concepts and Compromise in First Amendment Religious Doctrine, 67 Calif. 817(1984).] Mrs. Snider's religious convictions are characterized as "subjective personal standards" unprotected by the challenged Code Section (see Motion to Dismiss, p.20), because they are not shared by...all members of their fundamentalist group within the Catholic church." (Brief of Amicus Curiae, Attorney General of Virginia, pp.4-5; emphasis added). If Virginia's position were the law of the land, a modern day Martin Luther would not be entitled to protection under the religion clauses of the Constitution. Indeed, St. Thomas Aquinas's religious views on education would be suspect to the extent he and the Papacy differed philosophically.

The dispositive principle disregarded by the state courts is this: "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith [since] religious beliefs worthy of respect are the product of free and voluntary choice by the faithful." Wallace v. Jaffree, 53 LW 4665, 4669(1985). This principle applies to Catholics who dissent from what the Vatican prescribes as orthodox. Cf. Board of Education v. Barnette, 319 U.S. 624, 642(1943).

The Virginia Supreme Court's decision upholds the constitutionality of the challenged Virginia Code Sections and is not moot.

The Appellee argues that the Virginia Supreme Court did not "explicitly" pass

on any federal question (see Motion to Dismiss, p. 19.). The Appellee, however, fails to reveal that the Virginia Supreme Court was persuaded by the argument -- repeated once again in their Motion -- that "the beliefs of the Sniders...were not based on religion" and therefore "there were no constitutional questions to be decided." (Appellee's Motion to Dismiss, p.21). Clearly the case is not moot because of the continuing harm, the likelihood of future recurrences of harm, and the collateral consequences of Appellants' guilty convictions. See e.g., Sibron v. New York, 392 U.S. 40(1968), and North Carolina v. Rice, 404 U.S. 244(1971).

The argument that the case involves the sufficiency of the evidence rather than a federal question is a red herring that unsuccessfully conceals the mischief of the challenged statute.

Appellants do not question the trial court's "finding" that the Sniders' religious beliefs are not "bona fide" within the meaning of the exemption in Virginia compulsory attendance law. Indeed, because Appellants' evidence was legally insufficient to demonstrate their religious beliefs are "bona fide" under Code Section 22.1-257, Virginia's statutory exemption is invidiously underinclusive. As the state court points out, the statute requires all professing Catholics to "be governed by tenets of that [Catholic] faith" (Tr. dated Oct. 27, 1983, p. 38) regardless of their "sincere religious convictions."

(Id. at 39). As the trial judge stated:

> I don't have any trouble finding [the Sniders] are sincere. She is just as sincere as she can be. But I don't think it is based on theology. It's based on a difference of philosophy [with the Roman Catholic Church authorities] and the statute says it can't be based on philosophy. (J.S., A-20)

Although, under Virginia law, a person who professes to be a Roman Catholic must adhere to a particular theology in line with the trial judge's reading of the Encyclicals (J.S., A-14) and his personal knowledge of the Catholic faith (J.S., A-14) in order to qualify for a bona fide religious exemption, the religion clauses of the Constitution are not so restrictive. The First Amendment respects theology but also respects "a broader concept of individual freedom of mind [allowing] the individual to choose his own creed." Wallace v. Jaffree supra at 4669. Hence the instant appeal.

Contrary to Appellee's misleading summary of the testimony of a Roman Catholic priest (Motion to Dismiss, pp.13-15), Father Ringrose testified that the Sniders' faith-inspired beliefs fall "right into line with that of all traditionalist Catholics..." (Tr. dated September 22 and 23, 1983, p. 109). Concerning the Encyclical relied upon by the Appellants, Father Ringrose testified, "We are bound by it as Catholics. We must follow it" (Ibid.) for such "[a]n Encyclical cannot be in or out of vogue." (Tr. 132). Accordingly, Appellants could not, in conscience, send their children to public or parochial school because "they have sincerely arrived at a firm conviction" that the nearby schools "would endanger the faith of the...children, and would expose them to an occasion of sin which they must, by

Catholic teaching, avoid." (Tr. 121). (See also Tr. 124-125.) Indeed, although other traditional Roman Catholics in addition to the Appellants educate their children at home (Tr. 97), and some do not -- the Sniders have no alternative to home education if they are to be "obedient to the faith." (Tr. 125-126).

Despite this kind of testimony, the trial court "decided as a matter of fact, that the Sniders' **religious beliefs** were not rooted in **Catholic theology** but constituted philosophical views that differed from other members of their faith." (Appellee's Motion to Dismiss, pp.17-18) (emphasis added). Because the trial judge's findings were based in part upon his "personal knowledge of the Catholic faith" (J.S., A-14) and his own understanding of the relevant Encyclicals, which, in his view, were taken a

"little far" (J.S., A-14) by Appellants, the trial court consistently characterized Father Ringrose's conception of sin as "subjective opinion", "morality" and as "philosophical...rather than theological..." (Tr. dated October 27, 1983, p.18).

Lower court's judgments, upheld by the Virginia Supreme Court, which found no reversible error, violates the principles of United States v. Ballard, 322 U.S. 78(1944) and Thomas v. Review Board, 450 U.S. 707(1981). These cases hold that the concept of constitutionally protected religion does not depend on whether an individual's religious beliefs are objectively true, are unanimously held by members of his church, or are in accordance with the theology of any particular church hierarchy.

CONCLUSION

The Sniders' creed stems from their reliance upon sacred texts, from their religious feelings of awe, fear, and guilt, from their belief in God and an afterlife, from their comprehensive view of the world, human purposes, and from their **perspective** on moral obligations derived from God's nature. It follows that their creed is religious in nature. See Alston, "Religion" in Encyclopedia of Philosophy discussed by Greenawalt, Religion as a Concept in Constitutional Law, 72 Calif.L. Rev. 753, 764-767(1984). Yet, their religious beliefs are not deemed "bona fide" under the challenged Virginia Code Sections.

Virginia's modern view discriminates against religious creeds that are deemed subjective, personal, and philosophical by trial courts more concerned with

questions of theology rather than with questions of faith. This modern view is contrary to James Madison's position expressed in the Memorial and Remonstrance Against Religious Assessments, where it is written: "The Religion...of every man must be left to the conviction and conscience of every man; and...the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men..." This is the view of the First Amendment, Wallace v. Jaffree, supra at 4669 n.38.

In sum, when the presence of religion is seriously controverted, the threshold question, 'defining religion,' becomes important." Greenawalt, supra at 753. This appeal does not involve routine questions about the sufficiency of evidence, but involves, concerning the

religion clauses of the United States Constitution, important questions of classification and definition. Indeed, the outcome of this appeal will have nationwide, worldwide and historic importance.

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No. 84-1724

IN THE SUPREME COURT OF THE UNITED STATES

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COMMONWEALTH OF VIRGINIA,

Appellee.

On Appeal From The Supreme Court
Of The Commonwealth of Virginia

BRIEF AND APPENDIX OF AMICUS CURIAE, ATTORNEY GENERAL OF VIRGINIA ON BEHALF OF VIRGINIA BOARD OF EDUCATION

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The Interest of the Amicus Curiae

Pursuant to Supreme Court Rule 36, the Attorney General of Virginia, as amicus curiae, files this brief for the Virginia Board of Education. The appellants challenge, on federal constitutional grounds, Virginia's compulsory school attendance requirements. The Commonwealth of Virginia has a fundamental and irrefutable interest in a well-educated citizenry. The statutory law challenged in this appeal represents and expresses that basic interest and objective, as enacted by the Virginia General Assembly and supported by the Virginia Board of Education and the State Superintendent of Public Instruction. For the reasons hereinafter set out, the amicus curiae respectfully supports dismissal of this appeal or affirmance of the judgment below.

Summary of Argument

The challenged statutory law, on its face, is broadly tolerant of religious freedoms. It reasonably accommodates individual beliefs with the interest of the Commonwealth in a well-educated citizenry. The judgment below is based upon narrow evidentiary findings of the Henrico County Circuit Court. Accordingly, the judgment below raises no issue of

national importance. Moreover, the Virginia compulsory school attendance law, challenged in this appeal, has been substantially amended since the decision below, to allow home instruction by a child's parent through use of a correspondence course. It is unnecessary, therefore, for this Court to consider the question of whether the state's former compulsory school attendance law, which prohibited unapproved home instruction as a substitute for school, is constitutionally infirm. No federal constitutional issue or question of national importance is presented.

Argument

The fundamental interest of the state in promoting an educated citizenry has been repeatedly recognized and affirmed by this Court. San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); Wisconsin v. Yoder, 406 U.S. 205, 213, 237, 238-239 (1972); McCollum v. Board of Education, 333 U.S. 203, 212 (1948); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). While parents have a constitutional right to send their children to private schools and to select private schools offering specialized instruction, they have "no constitutional

right to provide their children with private education unfettered by reasonable government regulation." Runyon v. McCrary, 427 U.S. 160, 178 (1976), Board of Education v. Allen, 392 U.S. 236 (1968). This Court, despite its profound concern for the accommodation of religious beliefs by state compulsory attendance laws, has lent:

> "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society."

Wisconsin v. Yoder, supra. at 239.

The Virginia compulsory school attendance law on its face provides broad tolerance and accommodation to the religious beliefs of its citizens. As it existed when this case was decided by the state court below (November 1983), the Virginia statute provided specific alternatives to public school attendance and specific exemptions. See § 22.1-256 of the Code of Virginia reprinted in the Jurisdictional Statement, at 7. For example, any pupil who, together with his parents, was conscientiously opposed to school attendance by reason of bona fide religious training or belief, could be excused. Consistent with Yoder, the compulsory school

attendance law provided that "bona fide religious training or belief" excluded essentially political, sociological or philisophical views or a merely personal moral code. See § 22.1-257 of the Code of Virginia reprinted in the Jurisdictional Statement, at 8-9.

That statute, challenged by appellants, was upheld by the Virginia Supreme Court a year prior to the decision below in this case. See Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (Va. 1982). See also, Rice v. Commonwealth, 188 Va. 224, 49 S.E.2d 342 (Va. 1948) upholding an earlier version of the challenged state statute.

The decision below involving appellants, however, is not based upon federal constitutional issues; it is a decision pivoting upon a question of fact: whether bona fide religious beliefs, were, or were not, demonstrated by the evidence. The court below found, on the evidence presented, that the appellants were following their own idiosyncratic interpretations permitting only home-correspondence course instruction for their children. The appellants' views, the trial court found, were not bona fide religious beliefs shared by their Church, or even by all members of their fundamentalist

group within the Catholic Church. There is no contest here that the appellants were not provided a fair hearing.

This appeal fundamentally raises nothing more than an issue regarding the sufficiency of the evidence before the trial court. There is no valid reason for this Court to resolve afresh the underlying factual dispute presented to the trial court. See Fry Roofing Co. v. Wood, 344 U. S. 157, 160 (1952).

Moreover, when this case was decided below, the then existing compulsory school attendance law did not permit home instruction of children by an unapproved tutor or teacher to supplant school attendance. See Grigg, supra. Effective July 1, 1984, the Virginia compulsory school attendance law was amended to permit home schooling by parents when certain statutory criteria are met. The current statute specifically permits the use of approved home correspondence courses as a substitute for school attendance. This changed legislative policy is clearly stated in the introduction to the amended statute:

> "When the requirements of this section have been satisfied, instruction of children by their parents in their home is an acceptable alternative form of

> education under the policy of the Commonwealth of Virginia." § 22.1-254.1(A).[1]

Further, under the amended statute, the Attorney General of Virginia has held that parents who demonstrate that school attendance and its statutory equivalents, such as home instruction, do not accommodate their bona fide religious beliefs, may be completely excused from Virginia's compulsory school requirements. See 1983-1984 Report of the Attorney General at 305.

In short, appellants ask this Court to perform two exercises: (1) to reexamine the evidence presented to the trial court and (2) to strike down a statute which no longer exists, and which, on its face, does not violate any religious freedom. This Court, it is respectfully urged, should decline to engage in such exercises.

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[1] This entire statutory provision, which adds the allowance for home schooling, is reprinted in the Appendix to this Brief.

Conclusion

For the reasons stated herein, this appeal should be either dismissed or judgment below affirmed.

Respectfully submitted,

ATTORNEY GENERAL OF
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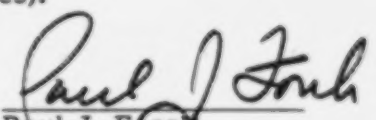
Certificate of Service

I hereby certify, in accord with Supreme Court Rule 28.5(b), that on the 3rd day of June, 1985, I mailed three copies of this Brief and Appendix of Amicus Curiae to the

following counsel of record in this appeal by first class postage, prepaid: William A. Beeton, Jr., Esquire, 3817 Plaza Drive, Fairfax, Virginia 22030 (Attorney for Appellants) and H. Albert Nance, Jr., Esquire, Commonwealth's Attorney for the County of Henrico, Virginia, P. O. Box 27032, Richmond, Virginia (Attorney for Appellees).



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APPENDIX

Section 22.1-254.1 of the Code of Virginia provides:

> Declaration of policy; requirements for home instruction of children. A. When the requirements of this section have been satisfied, instruction of children by their parents in their home is an acceptable alternative form of education under the policy of the Commonwealth of Virginia. Any parent of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the seventeenth birthday may elect to provide home instruction in lieu of school attendance if he (i) holds a baccalaureate degree in any subject from an accredited institution of higher education; or (ii) is a teacher of qualifications prescribed by the Board of Education; or (iii) has enrolled the child or children in a correspondence course approved by the Board of Education; or (iv) provides a program of study or curriculum which, in the judgment of the division superintendent, includes the standards of learning objectives adopted by the Board of Education for language arts and mathematics and provides evidence that the parent is able to provide an adequate education for the child.
>
> B. Any parent who elects to provide home instruction in lieu of school attendance shall annually notify the division superintendent in August of his intention to so instruct the child and provide a description of the curriculum to be followed for the coming year and evidence of having met one of the

criteria for providing home instruction as required by paragraph A of this section. The division superintendent shall notify the Superintendent of Public Instruction of the persons approved to provide home instruction.

C. The parent who elects to provide home instruction shall provide the division superintendent by August 1 following the school year in which the child has received home instruction with either (i) evidence that the child has attained a composite score above the fortieth percentile on a battery of achievement tests which have been approved by the Board of Education for use in the public schools or (ii) an evaluation or assessment which, in the judgment of the division superintendent, indicates that the child is achieving an adequate level of educational growth and progress.

In the event that evidence of progress as required in this paragraph is not provided by the parent, home instruction shall cease and the parent shall make other arrangements for the education of the child which comply with § 22.1-254 of the Code of Virginia.

D. For the purposes of this section, "parent" means the biological parent or adoptive parent, guardian or other person having control or charge of a child.

Nothing in this section shall prohibit a pupil and his parents from obtaining an excuse from school attendance by reason of bona fide religious training or belief pursuant to § 22.1-257 of the Code.

E. Any party aggrieved by a decision of the division superintendent may appeal his decision within thirty days to an independent hearing officer. The independent hearing officer shall be chosen from the list maintained by the Executive Secretary of the Supreme Court for hearing appeals of the placements of handicapped children. The costs of the hearing shall be borne by the party appealing.